In The

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1958

No. 936

BLUM VESTAL JOHNSON and
COMMIE ALLEN JOHNSON,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	2
Reasons for Granting the Writ	4
Appendix 1	9

CITATIONS

Cases:

Bozza v. United States, 67 S. Ct. 645, 330 U.S. 160 ..... 2, 5

Johnson v. United States, 207 Fed. 2d 461 7

United States v. Smith, 67 S. Ct. 1330, 331 U.S. 469 5

Statute:

Title 18 U.S.C.A. section 2 ..... 2, 4

Miscellaneous:

Rule 7 (c) of Federal Rules of Criminal Procedure .. 2

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The petitioners, Blum Vestal Johnson and Commie Allen Johnson, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Opinion Below

The per curiam opinion of the Court of Appeals (Petitioner's Appendix 1) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on April 8, 1959. The petition for re-hearing was denied on April 21, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

Questions Presented

1. May the United States cite specific statutes and sustain a conviction as principals when the evidence against the defendants at most would show them to be only aiders and abetters?

2. Is the sufficiency of the evidence in a single case one of general importance to suffice an order of review by the Supreme Court?

3. Does the opinion in the instant case conflict with the holdings of the Supreme Court of the United States in *Bozza* vs. *United States*, 67 S. Ct. 645, 330 U. S. 160?

Statutes Involved

The statutory provisions involved are 26 U.S.C.A., Sections 5601, 5606, 5216 and 5008; Title 18 U.S.C.A., Section 2; and Rule 7 (c) of the Federal Rules of Criminal Procedure.

Statement

The defendants, Blum Vestal Johnson and Commie Allen Johnson, along with two other defendants, were charged

in a bill of indictment containing four counts, for the violation of Title 26 USC Sections 5601, 5606, 5216, and 5008. The other two defendants, Enoch Clay Johnson and James Gilbert Johnson, entered pleas of Guilty when the case was called for trial in the District Court. The defendants, Blum Vestal Johnson and Commie Allen Johnson, entered pleas of Not Guilty and went to the jury. The charges were that they possessed a still set up without having registered same as required by law; that they carried on the business of a distiller without having given bond as required by law; that they fermented mash fit for distillation on premises other than a distillery authorized according to law; that they possessed distilled spirits in containers which did not have the required stamps affixed thereto. The petitioners were arrested while asleep in an automobile approximately one and one-half mile from the scene of the distillery. Commie Allen Johnson, at the time of his arrest, had mash on his clothing and was in the front seat of the automobile which was titled in his mother's name and which he claimed, and which automobile bore the same license plate as had been identified on a car traveling up a public road some distance from the distillery. He had a flash light with him which he claimed. Blum Vestal Johnson was in the back seat of the car with clean clothing on with the exception that his pant legs were damp and some weed seeds were on his clothing. A flash light was laying up on the back seat with an amber colored glass therein. The distillery was seized about 2:30 in the morning and the other two defendants, Enoch Clay Johnson and James Gilbert Johnson, were arrested at the distillery. The petitioners were arrested at the point indicated about 5:30 on the same morning.

The jury convicted the petitioners and from a sentence of 18 months as to Blum Vestal Johnson and 15 months as

to Commie Allen Johnson, they appealed to the United States Court of Appeals for the Fourth Circuit.

Reasons for Granting the Writ

Rule 7 (c) of the Federal Rules of Criminal Procedure requires that: "The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated."

Title 18 U.S.C.A. section 2, provides:

> "(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.
>
> (b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

Title 18 USCA section 2 was not set out in the bill of indictment and there was no charge in the bill of indictment of aiding or abetting and there was no evidence before the court as to the petitioners guilt except as aiders or abetters. The possession of the distillery was in Enoch Clay Johnson and James Gilbert Johnson, the other two defendants who pleaded guilty. As to Count 2 in the charge Enoch Clay Johnson and James Gilbert Johnson were the ones there carrying on the business of a distillery without having given bond as required by law. Enoch Clay Johnson and James Gilbert Johnson were in possession of the fermented mash fit for distillation, and the distilled spirits

in containers that did not have the required stamps were in the possession of Enoch Clay Johnson and James Gilbert Johnson.

The petitioners were tried as principals and convicted as such without the citation of the statute which Congress has seen fit to enact making those who aid, abet or assist guilty as principal. If the Federal Rules of Criminal Procedure are enacted for the purpose of depriving the defendant of his rights then the defendants cannot complain at the failure of the government to cite Title 18 USCA section 2. If they are enacted to do equal justice between the United States and the defendant then their case ought to be reviewed.

The degree of proof required before the case may be submitted to the jury is a question of general importance and where the allegations in the indictment are lacking in proof to the extent they are in the instant case against these petitioner then the court should grant a writ of certiorari.

In the case of *United States* v. *Smith*, 67 S. Ct. 1330, 331 U. S. 469, decided June 2, 1947, this court in discussing the Federal Rules of Criminal Procedure held that the court was without power to extend the five day limit on making motions for new trial. It is apparent from the cited case that the rule against the defendant is strictly construed and it ought to be as strictly construed as against the government.

The petitioners cite the case of *Bozza* v. *United States*, 67 S. Ct. 645, 330 U.S. 160, decided February 17, 1947, and we quote from Justice Black's opinion as follows:

"The Internal Revenue statutes have broken down the

various steps and phases of a continuous illicit distilling business and made each of them a separate offense. Thus, these statutes have clearly carved out the conduct of making mash as a separate offense, thereby distinguishing it from the other offenses involving other steps and phases of the distilling business. Consequently, testimony to prove this separate offense of making mash must point directly to conduct within the narrow margins which the statute alone defines. One who neither engages in the conduct specifically prohibited, nor aids and abets it, does not violate the section which prohibits it.

"The sufficiency of the evidence as to count two which charged that the petitioner had custody or possession of the still is a closer question. It might be possible that petitioner's helping to make the alcohol aided and abetted in its "custody or possession." But that would be a very strained inference under any circumstances. Here again the statutes treat custody or possession as a wholly distinct offense. Yet there was no testimony that the petitioner ever exercised, or aided the exercise of, any control over the distillery. His participation in carrying the finished product by car does not fit the category of "custody and possession" so nearly as it resembles the transportation of illegal liquor, 26 U.S.C. 2803, 26 U.S.C.A. Int. Rev. Code, 2803—an offense which the Circuit Court of Appeals has found the evidence insufficient to prove. Nor was there any testimony that the petitioner acted in any other capacity calculated to facilitate the custody or possession, such as, for illustration, service as a caretaker, watchman, lookout or in some other similar capacity."

In the instant case the government failed to show that

these petitioners were ever closer to the distillery than where they were arrested, which was approximately one and one-half mile away, and under the Bozza case above cited we do not see how the instant case can be otherwise than in conflict with the decisions of this Court in the Bozza case.

The petitioners also contend that the opinion in the instant case conflicts with the opinion of the Fourth Circuit in the case of *Johnson* vs. *United States*, 207 F. 2d 461.

Therefore, your petitioners respectfully contend that they are entitled to have the Court grant the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, and pray that such order be made.

Respectfully submitted,

RAYMOND KYLE HAYES

T. R. BRYAN

Attorneys for Petitioners

PETITIONER'S APPENDIX 1

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 7806.

BLUM VESTAL JOHNSON and
COMMIE ALLEN JOHNSON,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT WILKESBORO. EDWIN M. STANLEY, DISTRICT JUDGE.

(Argued April 6, 1959. Decided April 8, 1959.)

Before SOBELOFF, Chief Judge, and BOREMAN and THOMPSON, District Judges.

Kyle Hayes and T. R. Bryan for Appellants, and H. Vernon Hart, Assistant United States Attorney, (James E. Holshouser, United States Attorney, and Lafayette Wil-

liams, Assistant United States Attorney, on brief) for Appellee.

PER CURIAM:

Appellants were tried on an indictment, containing the usual counts, charging the operation of an unregistered distillery. Following the presentation of the government's evidence, the defendants moved for a directed verdict of acquittal, which motion the Court overruled. The case was submitted to the jury, the defendants having presented no evidence in their own behalf. The jury returned a verdict of guilty; and the defendants moved to set aside the verdict, which motion was also overruled.

On this appeal, the only question presented is whether the Court erred in overruling the motions of the defendants.

Upon a motion for a directed verdict of acquittal in a criminal case, the test is whether there is substantial evidence which, viewed in the light most favorable to the government, tends to show that the defendant is guilty beyond a reasonable doubt; and the rule is the same whether the evidence is direct or circumstantial. *Linden* v. *United States*, 254 F. 2d 560 (4 Cir, 1958); *Bell* v. *United States*, 185 F. 2d 302 (4 Cir. 1950). In the instant case, although wholly circumstantial, there was clearly sufficient evidence from which a reasonable mind might fairly conclude guilt beyond a reasonable doubt. Although we have closely scrutinized and appraised the sufficiency of the evidence in the case before us, it would serve no useful purpose to detail the evidence here since each decision in this field must be based on the particular facts of the case. See *Bell* v. *United States*, supra, at page 310.

On a motion to set aside a verdict and grant a new trial on the ground that it is contrary to the evidence, the trial court is invested with a wide discretion, and his action thereon will not be disturbed in the absence of a showing of an abuse of discretion. *Middleton* v. *United States*, 249 F. 2d 719 (4 Cir. 1957). In the instant case, there is nothing to indicate such abuse.

Affirmed.

FILED
JUN 19 [illegible]
JAMES R. BROWNING,

No. 936

In the Supreme Court of the United States

OCTOBER TERM, 1958

BLUM VESTAL JOHNSON AND COMMIE ALLEN JOHNSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	7

CITATIONS

Cases:

Bozza v. *United States*, 330 U.S. 160	6
Jin Fuey Moy v. *United States*, 254 U.S. 189	6
Melling v. *United States*, 25 F.2d 92	6
Nye & Nissen v. *United States*, 168 F.2d 846, affirmed, 336 U.S. 613	6
O'Brien v. *United States*, 25 F.2d 90	6
United States v. *Knickerbocker Fur-Coat Co.*, 66 F.2d 388	6

Statutes:

Internal Revenue Code of 1954 (26 U.S.C., Supp. V):	
Sec. 5008	2
Sec. 5216	2
Sec. 5601	2
Sec. 5606	2
Sec. 5626	7
18 U.S.C. 2	2, 6

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 9-11) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1959 (R. 41).[1] A petition for rehearing

[1] "R." refers to the record as filed in this Court; "Tr." to the transcript of the trial proceedings.

was denied on April 21, 1959 (R. 44). The petition for a writ of certiorari was filed on May 21, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in view of the fact that the judge gave a charge on aiding and abetting, the indictment was defective in failing to specify that petitioners were aiders and abettors.

2. Whether the evidence supports the verdict.

STATUTE INVOLVED

18 U.S.C. 2 provides:

> Principals.
>
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT

A four-count indictment charged the petitioners and two others with possessing an unregistered still, carrying on the distilling business without having given bond, making and fermenting mash for distillation on premises other than a duly authorized distillery, and possessing distilled spirits in containers which did not have the required stamps affixed in violation of 26 U.S.C. (Supp. V) 5008, 5216, 5601

and 5606 (R. 17-18). The two co-defendants pleaded guilty. Following a jury trial in the United States District Court for the Middle District of North Carolina, petitioners were found guilty. Petitioner Blum Vestal Johnson was sentenced to serve a prison term of eighteen months; petitioner Commie Allen Johnson was sentenced to serve a prison term of fifteen months (R. 13). On appeal, the judgments were affirmed (R. 37-39, 41). The evidence may be summarized as follows:

At about 1:15 a.m. on July 11, 1958, six investigators for the Alcohol and Tobacco Tax Unit were searching for a reported unregistered distillery in the Windy Gap Section of Wilkes County, North Carolina (Tr. 4). They smelled an odor of fermented mash, could see lights in the woods and heard buckets being handled (Tr. 6).

At about 2 a.m., the investigators saw an old Chevrolet pick-up truck travel empty up Windy Gap Road in the direction of petitioner Commie Johnson's home (Tr. 7-8, 43, 64-66). Its light was seen to swerve near the driveway of Commie Johnson's home. About ten minutes later, the truck came down the road with a large square object in the back (Tr. 42-43, 45, 107). After passing the investigators, the truck stopped and there was a scraping noise as though something were being loaded or unloaded (Tr. 10, 45). Three flashlights, two with amber beams and one with a red reflector, were observed in the area where the truck had stopped (Tr. 10, 90). Three figures were observed carrying from the truck through a grassy field a large wooden box of the

type commonly used as a fermenter box at a distillery (Tr. 11-12, 38-39). The box was rolled down near a creek bank where a new fermenter box was later found on the creek bank directly opposite the still. Two of the men started back toward the truck, one carrying a red reflector flashlight (Tr. 12, 70, 111). The truck left with these two men, and the third man returned to the woods in the direction where the distillery was later discovered (Tr. 12, 70).

At the distillery, which was unregistered, Enoch and James Johnson (the defendants who pleaded guilty) were observed working—one dipping mash out of a bucket and the other pouring mash into the still (R. 23; Tr. 47). They fled when Investigator Carter announced himself as a federal officer but were subsequently arrested (Tr. 12, 48, 71). A later investigation along the side of the road near the still revealed four five-gallon jacketed cans of whiskey with no stamps affixed to the containers (Tr. 94).

At about 3:30 a.m., the Chevrolet truck and an Oldsmobile sedan, each occupied by one person, were observed on Windy Gap Road (Tr. 13-15, 92, 94, 113-114). The truck had a long board protruding from the rear (Tr. 17, 114). A few minutes later, the Oldsmobile came back down the road with two people inside (Tr. 15-16). A short time later, the investigators observed the Chevrolet truck on Commie Johnson's premises (Tr. 97, 98, 115). A residue of coal and coke was found in the back of the truck (Tr. 97, 98, 116). A long board, fourteen feet long and two to four feet wide with small pieces of wood

nailed to each end, was observed in the weeds and bushes near the truck (Tr. 98).[2]

Between 5:00 and 5:30 a.m. (Tr. 98), two investigators found petitioners asleep in the Oldsmobile (Tr. 99, 116) about a mile from the distillery (Tr. 120). Each had a flashlight near him, the flashlight nearest Blum Vestal Johnson being of the red reflector type (Tr. 99, 117). The trouser legs of each petitioner from about half-knee high down to their shoes were wet, and grass seeds similar to those on the trouser legs of the investigators who had been in the field near the still were on the trouser legs of the petitioners (Tr. 100, 117) or in their trouser cuffs (Tr. 72). There was an odor of mash (Tr. 99) and particles of mash were observed on the trousers of Commie Allen Johnson from about waist high down (Tr. 72, 99, 117). When asked if they would like to accompany the investigators to the distillery, petitioners declined and urged the investigators not to require them to go there (Tr. 118). In the trunk of the Oldsmobile, a residue of coke and coal and a little sugar were found (Tr. 117).

ARGUMENT

1. Petitioners contend in this Court for the first time that, since they were not found at the distillery

[2] Special Investigator Lawson testified that a "take-off board" was often used to transfer liquor and other material to or from a distillery at a "take-off point" along the road in order to avoid leaving discernible signs along the side of the road (Tr. 94-95). Such a board was about fourteen to sixteen feet in length, sometimes with two other small pieces of wood nailed to it to prevent it from slipping (Tr. 95).

and the judge gave a charge on aiding and abetting, the indictment was defective in failing to charge that they were aiders and abettors and in failing to cite 18 U.S.C. 2, the statute which provides that aiders and abettors are liable as principals. It is well established, however, that, since aiders and abettors are liable as principals, the indictment need not specifically allege that the defendants are charged as aiders and abettors. *Jin Fuey Moy* v. *United States*, 254 U.S. 189, 192; *O'Brien* v. *United States*, 25 F. 2d 90, 91 (C. A. 7); *Melling* v. *United States*, 25 F. 2d 92, 93 (C. A. 7); *United States* v. *Knickerbocker Fur Coat Co.*, 66 F. 2d 388 (C. A. 2). See *Nye & Nissen* v. *United States*, 168 F. 2d 846, 855 (C. A. 9), affirmed, 336 U.S. 613. And while the judge properly did charge on the subject, the evidence suggests that petitioners were principals, rather than aiders and abettors, in the criminal enterprise.

2. The attack on the sufficiency of the evidence is without merit. The circumstances summarized in the Statement, *supra*, fully justified the inference that petitioners participated, either as principals or as aiders and abettors, in carrying on the business of an unregistered distillery by bringing materials to the still, including the fermenter box, and using their vehicles in the operation. In *Bozza* v. *United States*, 330 U.S. 160, which petitioners cite, this Court held that, although the evidence did not disclose that the defendant there mixed mash or possessed the distillery, there was evidence that he helped the owner of the still and that he was, therefore, properly convicted of aiding the owner in carrying on the busi-

ness of a distiller. Since in this case the general sentence imposed on each of the petitioners is less that the maximum permitted on the count charging the carrying on of the business (see 26 U.S.C. (Supp. V) 5626), the conviction may properly be supported on that count alone.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

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